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(I)



In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 425

WILLIAM K. JACOBS, JR., PETITIONER

v.

JANE M. HOEY, AS EXECUTRIX OF THE ESTATE OF
JAMES J. HOEY, DECEASED

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 219-228) is unreported. The opinion of the Circuit Court of Appeals (R. 246-251) is reported in 136 F. 2d 954.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 16, 1943 (R. 251-252). The petition for a writ of certiorari was filed on October 15, 1943. The jurisdiction of this Court is

(1)

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner, on the cash receipts basis, is required to include in gross income payments on account of executor's commissions in the year of receipt or in the later year when those payments were approved by the Surrogate.

STATUTES INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of account-

ing permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

STATEMENT

The pertinent facts herein involved are as follows:

Aaron E. Norman died on July 1, 1936, leaving an estate having a gross value in excess of \$3,000,000. His will was admitted to probate by the Surrogate of New York County, and letters testamentary were issued on August 3, 1936, to the five executors named in the will (R. 229).

On December 17, 1936, the five executors agreed with one another in writing, subject to the approval of the Surrogate, that petitioner, one of the executors, would receive 2% as his commissions as executor, that John S. Borg, another of the executors, would receive 1½% as his commissions, and that the remaining three executors, who were members of the decedent's family, would waive their commissions (R. 230). Prior to December 23, 1936, petitioner, knowing that his commissions would amount to about \$60,000 if he properly performed his duties as executor, requested his coexecutors for a payment of \$20,000 on account of such commissions. His coexecutors agreed to the payment, subject to the approval of counsel. Petitioner was then advised by counsel for the executors that such advance on account of commissions, while irregular, was not infre-

quently made, and it had been held in a recent decision not to render the executor chargeable with interest where the estate had not been prejudiced. Accordingly, the other executors approved payment of \$20,000 to petitioner in 1936, and a further payment of \$19,500 in 1937, in consideration of his promise to indemnify them against any liability which might result therefrom. (R. 79-81, 220-221, 231.)

In connection with the payment on account of commissions made in 1937, counsel for the executors wrote a letter of advice to each of the executors which concluded thus (R. 180):

In summary, we wish to state that payment of commissions to Executors prior to an accounting is frequently done, and there is no illegality in making such payment. The only risk that is run is the risk that the Surrogate will not allow the statutory commissions, which disallowance occurs only in the event of negligent or dishonest performance of duties by the Executors.

When the executors had their first accounting in the year 1938, the Surrogate, by decree of December 27, 1938, allowed the sums taken as commissions in 1936 and 1937 without charging interest against the petitioner because the payments had been made in advance of a judicial settlement (R. 138, 227).

The petitioner commingled the payments he had received on account of commissions in 1936 and

1937 with his own funds, and treated them as payments of commissions both on his own books, and on the books of the estate; both sets of books were kept under his direction, and on the cash receipts basis. In his income tax returns for those years he included the payments as though they were executor's commissions earned at the time he received the advances, and in the returns for the estate he deducted as administration expenses that part of the commissions he had received which was attributable to income. (R. 228, 232-233.)

In 1938, the petitioner incurred a loss in the liquidation of the American Portraiture Corporation, of which he was owner. This capital loss he would have been able to offset against the commissions he had received in 1936 and 1937 if they were properly attributable to the year 1938 in which they were allowed by the Surrogate. (R. 224.) He had been advised by counsel that there was reason to believe that the tax authorities would insist that the payments on account of commissions ought to have been made during the year 1938, when they were formally allowed by the Surrogate, rather than in the years when they were taken. With reference to such payments, counsel advised the petitioner that, if the taxing authorities should claim that they ought to have been included in the return for 1938 income, any overpayment of taxes that had been assessed on the sums received as commissions during the prior

years could be cured either by filing amended returns, or by bringing an action for refund. (R. 222.)

Petitioner never disclosed to the Collector or the Bureau of Internal Revenue that the Surrogate had not approved the commissions at the time when they were paid until about May 1938, by which time it was clear that the petitioner would have a large capital loss to offset, either in whole or in part, any income from commissions which could properly be allocated to the year 1938 (R. 234).

The petitioner filed claims for refunds of the taxes that had been assessed against him on the receipt of commissions in 1936 and 1937, which he had included in his returns of income for those years (R. 234). Upon the rejection of the refund claims by the Commissioner, the petitioner brought suit to recover \$9,835.74 alleged to have been unlawfully collected because of the \$20,000 he had received from the Norman estate in 1936, and \$7,188.19 alleged to have been unlawfully collected because of the \$19,500 he had received in 1937 (R. 3-8). The District Court dismissed the complaint upon the ground that the payments made in 1936 and 1937 on account of commissions were received by petitioner under a claim of right and without restriction as to their disposition and, therefore, constituted taxable income for the

years of their receipt (R. 219-241). The Circuit Court of Appeals affirmed the decision of the District Court (R. 246-251).

ARGUMENT

The court below correctly concluded that the payments received by petitioner in 1936 and 1937 on account of commissions were income for the years of receipt and taxable as such for those years. "No rule is better established in tax law" (*Barker v. Magruder*, 95 F. 2d 122, 124 (App. D. C.)) than that "If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent." *North American Oil v. Burnet*, 286 U. S. 417, 424. Since the assessment of federal income taxes is on the basis of an annual accounting period (*Burnet v. Sanford & Brooks Co.*, 282 U. S. 359), no other doctrine is practically possible. See *National City Bank of New York v. Helvering*, 98 F. 2d 93 (C. C. A. 2d). The decisions are, therefore, virtually unanimous in holding that a taxpayer is chargeable with taxable income in the year of receipt notwithstanding infirmities of title and the possibility of being compelled to respond to others for the amounts received. See *Chicago*,

R. I. & P. Ry. Co. v. Commissioner, 47 F. 2d 990 (C. C. A. 7th); *Board v. Commissioner*, 51 F. 2d 73 (C. A. A. 6th), certiorari denied, 284 U. S. 658; *Ford v. Commissioner*, 51 F. 2d 206 (C. C. A. 6th), certiorari denied, 284 U. S. 666; *Blum v. Helvering*, 74 F. 2d 482 (App. D. C.); *Mitchell v. Commissioner*, 89 F. 2d 873 (C. C. A. 2d); *Barker v. Magruder*, *supra*; *National City Bank of New York v. Helvering*, *supra*. And that rule has been applied even where the taxpayer has in fact restored in a subsequent year the amount previously received. *Griffin v. Smith*, 101 F. 2d 348 (C. C. A. 7th), certiorari denied, 308 U. S. 561; *Saunders v. Commissioner*, 101 F. 2d 407 (C. C. A. 10th).

In the instant case the District Court was justified in finding as a fact that petitioner received the amounts in question under a claim of right and without any restriction as to their disposition. (R. 232.) Those amounts were paid to him upon advice of counsel to the effect that payments of commissions to executors prior to final accounting were frequently made, and that the only risk involved would be disallowance of those commissions by the Surrogate in the event of negligent or dishonest performance of duties by the executors. See *Beard v. Beard*, 140 N. Y. 260. The payments were received with the permission of petitioner's coexecutors and members of the decedent's family who were chiefly interested in the estate. There was, therefore, no reasonable like-

lihood that petitioner would be called upon to return the sums paid to him; nor was he in fact required to do so. Moreover, the petitioner deposited the sums received with his other personal income and used those funds for his own personal purposes. His own books and the estate's books recorded the amounts received as commission payments earned.

We submit, therefore, that even if it be said that payment of the commissions to petitioner in 1936 and 1937 was technically improper, he clearly received them under a claim of right and without restriction as to their disposition.¹ His conduct unequivocally so indicates; and neither he nor any other person has ever questioned his claim. On the contrary, the Surrogate, by decree of December 27, 1938, actually approved the payments.

Commissioner v. Cadwalader, 88 F. 2d. 274 (C. C. A. 3d), certiorari denied, 301 U. S. 706, is not in conflict with the instant case. In the *Cadwalader* case, the estate being without funds with which to pay executor's commissions, the executrix in 1925 advanced money to herself and

¹ Despite petitioner's assertion (Br. 11) that "a taxpayer in order to take under a claim of right must have been entitled to receive the money," the decided cases make it clear that it is necessary at most that the taxpayer merely *claim* to be entitled to the money, not that he *in fact* be entitled to it. See *Griffin v. Smith*, *supra*; *Saunders v. Commissioner*, *supra*; *Ford v. Commissioner*, *supra*; *Barker v. Magruder*, *supra*; *National City Bank of New York v. Helvering*, *supra*.

issued a note to herself covering the so-called loan. She immediately took back the money, together with the note. The decision of the court was rested on the ground that she had properly omitted such amount from her taxable income in 1925 since she had received no income from the estate that year, but "had in effect simply received a note for her claimed commission and the whole matter was one of accommodation in order that the * * * estate might secure a deduction for tax purposes" (p. 275).

CONCLUSION

The decision of the court below is correct. It presents no conflict or question which would warrant further review. We respectfully submit that the petition should be denied.

CHARLES FAHY,
Solicitor General.

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
ARTHUR MANELLA,

Special Assistants to the Attorney General.

NOVEMBER 1943.

